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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 161

JOSEPH WHELESS, WILLIAM M. REED, HALSTEAD BURNET, ET AL., APPELLANTS,

vs.

THE CITY OF ST. LOUIS ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED NOVEMBER 28, 1890.

(17,576.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 13, 1900.

1 UNITED STATES OF AMERICA, }
Eastern Division of the Eastern Judicial District of Missouri, } ss:

In the Circuit Court of the United States in and for the Eastern Division of said District.

Be it remembered that on the 3rd day of October, A. D. 1899, there was filed in the clerk's office of said court a certain bill of complaint in words and figures as follows, to wit:

2 UNITED STATES OF AMERICA, }
Eastern Division, Eastern District of Missouri, } ss:

In the Circuit Court of the United States. In Equity.

To the honorable judges of the circuit court of the United States in and for the eastern division of the eastern district of Missouri:

The Bill of Complaint of JOSEPH WHELESS, S. MALONE Wheless, and Thomas M. Wheless, William R. Barnhart, Solomon L. Cohen, William L. Reed and Mary S. Reed, His Wife; Halstead Burnet and Mary Burnet, His Wife; Richard Shinnick and Isabelle Shinnick, His Wife; Robert R. Grant, John Gaughan, Ewing Hill and Octavia Hill, His Wife; Charles Herboth, Thomas B. Chambers, Joseph M. Crotty, Richard M. Crotty, Andrew Morello, William Morris and Margaret Morris, His Wife, Complainants,

versus

THE CITY OF ST. LOUIS, ROBERT E. MCMATH, President of the Board of Public Improvements of the City of St. Louis, and The Gilsonite Roofing & Paving Co., a Corporation, Defendants.

Your orators respectfully represent unto your honor that they are severally the owners of certain real-estate property in the city of St. Louis fronting and abutting on Whittier street between Washington boulevard and Finney Ave., in said city, and that they own a large majority and nearly all of the frontage of the property along the line of the said Whittier St. between the said limits, and that your orator, Thomas B. Chambers, is a non-resident of the State of Missouri and is a citizen of the State of Ohio, resident in the city of Cincinnati, and the complainants sue and bring this suit for themselves and on behalf of any and all others who may be in like situation with them and interested in the subject-matter thereof.

3 The defendant The City of St. Louis is a municipal corporation of the State of Missouri, organized and administered under a special charter duly ratified and adopted by the qualified voters of said city at an election held for that purpose on the 7th day of November, 1876, the same being a public law of the State of Missouri; the defendant Robert E. McMath is the duly elected, qualified, and acting president of the board of public improvements of

said city, said board being a public department of the legal organization of said city as established by its said charter, the said board and its said president being thereby charged with certain duties, as hereinafter indicated, and the defendant The Gilsonite Roofing & Paving Company is a corporation under the laws of the State of Missouri and having its principal office and place of business in the said city of St. Louis.

Your orators further show that the said defendant, The City of St. Louis, is authorized and empowered by its said charter to establish, maintain, and repair the streets, etc., of the said city and to provide for the costs and expenses thereof, such power and authority being conferred on said city by section 26, article III, of said charter, the same being in words and figures as follows, to wit:

"SEC. 26. The mayor and assembly shall have power within the city, by ordinance not inconsistent with the constitution or any law of this State, or of this charter: * * *

"Second. To establish, open, vacate, alter, widen, extend, pave, or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for grading, lighting, cleaning and repairing the same, and to condemn private property for public uses as provided for in this charter; to construct and keep in repair all bridges, streets, sewers and drains, and to regulate the use thereof."

Said charter further provides for the creation of a board of public improvements and a president thereof, and prescribes their duties in respect of the making, repairing, and maintaining of such streets, etc., and provides for the passing of ordinances by the municipal assembly of said city for said purposes, and provides for the letting of contracts for the doing of work necessary thereto and for the costs and expenses of said improvements, it being provided in said charter, in *th* article VI thereof, as follows, to wit:

4 "SEC. 17. The board of public improvements shall recommend to the assembly ordinances for the repairing and cleaning of all streets, alleys and highways, and for the construction of cross-walks, and no ordinance therefor shall be passed without such recommendations.

"SEC. 18. The cost of construction of all the foregoing improvements within the city shall be apportioned as follows: The grading of new streets, alleys, and the making of cross-walks, and the repairs of all streets and highways and the cleaning of the same, and of all alleys and cross-walks, shall be paid out of the general revenue of the city; and the paving, curbing, guttering, sidewalks, and the materials for the roadways, the repairs of all alleys and sidewalks, shall be charged upon the adjoining property as a special tax, and collected and paid as hereinafter provided. Whenever the estimated special taxes to be assessed against any property shall in the aggregate amount to more than twenty-five per cent. of the assessed value of said property, calculating a depth to such property of one hundred and fifty feet, then the assembly shall provide out of the general

revenue for the payment of the amount in excess of the said twenty-five per cent."

Amended by inserting charter sections 24 & 25, art. VI.

Your orators further show that, acting under and by virtue of the pretended authority of the provisions of said charter hereinbefore referred to and set out, the said municipal assembly of the city of St. Louis passed a certain ordinance, entitled "An ordinance to improve Whittier street between Washington Bl. and Finney Ave.," the same being known as ordinance No. 19681, approved February 1, 1899, providing for a certain improvement by the construction or paving of that portion of the said Whittier St., as aforesaid, and for the assessing of the costs thereof, the said ordinance being in words and figures as follows—that is to say:

"An ordinance to improve Whittier street between Washington boulevard and Finney avenue.

"Be it ordained by the municipal assemble of the city of St. Louis as follows:

"SEC. 1. The board of public improvements is hereby authorized and directed to cause Whittier street, between Washington Bl. and Finney Ave., to be improved by grading, preparing ground for the superstructure, curbing, guttering, laying a roadway pavement of vitrified paving brick on a concrete base and making all proper connections and intersections with other streets and alleys."

(Sec. 2 and 3 provide for the material and manner of construction of said street.)

"SEC. 4. The cost of preparing ground for the superstructure, curbing and guttering, concrete, vitrified brick pavement and all proper connections and intersections required shall be charged as a lien upon the adjoining property fronting or bordering on the improvement herein provided for, and shall be paid by the owners thereof, except as hereinafter provided. When said work is completed, the president of the board of public improvements shall compute the cost thereof, and levy and assess the same as a special tax against each lot of ground chargeable therewith, in the names of the owners thereof, respectively, in the proportion that the linear feet of each lot fronting or bordering on said improvement bears to the total number of linear feet of all the property chargeable with the special tax aforesaid, and shall make out and certify to the comptroller, on behalf of the contractor, bills of such cost and assessment, accordingly, as required by law.

"SEC. 5. Whereas the estimated cost of preparing ground for the superstructure, curbing, guttering, concrete, vitrified brick pavement and all proper connections and intersections required, as provided for by this ordinance, to be assessed against some of the lots fronting or bordering on the aforesaid improvement, amounts to more than twenty-five per centum of the assessed value of said lots, therefore, the amount in excess of twenty-five per centum and the cost of grading shall be paid by the city of St. Louis, and the sum of eight hundred and fifty dollars is hereby appropriated on account

thereof, payable out of the fund set apart for street improvements." Approved February 1, 1899.

Your orators further show to your honor that, acting under the foregoing provisions of the charter and general ordinances of said city and of said ordinance No. 19681, the said defendant, The City of St. Louis, on or about the 24th day of April, 1899, let and entered into a certain contract in writing, known as contract No. 5358, with the said defendant, The Gilsonite Roofing and Paving Co., whereby the said city awarded to and the said company accepted and undertook "the work of preparing ground for the superstructure, curbing, and guttering, three feet wide, and laying a roadway pavement on Whittier St. between Washington Bl. and Finney Ave.," etc., the said contract setting out the said charter and ordinance provisions and the specifications and general stipulations under which said contract was let and said work should be performed, and all such being made a part of said contract between said parties, and it being provided that said work should be begun within one week after written notice to do so should be given said company by the street commissioner of said city and should be fully completed within two months thereafter, the time of beginning, rate of progress, and time of completion being made essential conditions of said contract, a copy of which is hereto attached as Exhibit "A."

6 And it further expressly provided in said contract, in respect of the manner of payment for the work of improvement thus contracted to be done, as follows—that is to say:

"When all the work embraced in this contract is fully completed, agreeable to the specifications and stipulations of this agreement, and accepted by the street commissioner, said commissioner shall cause a careful measurement of said work to be made, and certify the same to the board of public improvements, who shall compute the cost thereof according to the terms and prices of this agreement, and levy and assess the same as a special tax against each lot of ground chargeable therewith, in the names of the owners thereof, except the amount in excess of twenty-five per centum of the assessed value of said property, which shall be paid by the city out of the funds available under ordinance No. 16981. And said special tax bills shall be made out by the president of the board of public improvements and by him registered in his office in full, and certified and delivered to the comptroller, and his receipt taken therefore, and by him registered and countersigned and delivered to the party of the first part (the defendant Gilsonite Roofing & Paving Co.) in whose favor they are issued for collection, and his receipt taken in full of all claims against the city on account of said work."

And your orators state that the cost and price of doing said work, as estimated by the said contracting parties under the agreed prices for said work stipulated in said contract, and which cost would be and is about to be levied and assessed as a special tax against the property of your orators abutting said improvement, and which would constitute a lien and encumbrance on the same and be a cloud on their respective titles, amounts to a sum largely in excess of ten thousand dollars.

Your orators further represent to your honor that the said contract was entered into between the said defendant parties, and the excessive costs of said improvement to be a tax and lien upon complainants' property *was* therein assessed and contracted without their knowledge or consent and without opportunity or right allowed them to be heard as to the reasonableness, justness, or propriety of the prices and costs thus sought to be assessed against their property, but the same is arbitrary, unjust, and excessive, and complainants state that under said charter and ordinances they are denied the right to be heard on or defend against said arbitrary and excessive tax thus levied upon their property by the said defendant city.

7 Your orators further represent unto your honor that the extent, quality, and value of their respective properties abutting on said improvement differ greatly *inter sese*, and the amount of benefits or damages accruing to or suffered by their several lots and the proportionate tax against them respectively are very unequal and disparate. The said Whittier St. is what is known as a "side street," and runs from north to south between the said terminal streets and across and at right angles to the said Washington & Finney Aves. and other intermediate and principal streets on which complainants' lots principally front. The depth of said lots on the said principal streets varies greatly, some being narrow strips of 25 or 30 feet front thereon and others having a frontage or depth of 50 or 100 feet and more, the value of said several lots differing greatly according to their depth and situation and according to the improvements on the same, some of said lots being vacant and others improved with costly residence and business buildings; and your orators show that the benefits, if any they may receive, accruing to the several lots on the line of said improvement differ greatly from lot to lot, as above indicated, and some of said lots have suffered distinct and serious damage, some by cuts and changes of grade in their front and others by having considerable parts taken off them and imposed with a burden of roadway and sidewalks in the course of said construction, and the amount of special tax sought to be assessed and levied against said lots respectively, in proportion to the linear feet of each lot as provided in said charter and ordinance, is unequal and disproportionate to the value of said lots, some lots being liable to an assessment equal to a very small percentage of their value, while "the cost to be assessed against some of the lots fronting or bordering on the aforesaid improvement amounts to more than twenty-five per centum of the assessed value of said lots," as recited in terms in the said ordinance No. 19681, the proportion of said special assessment which is threaten-d to be levied against the abutting lots of one of these complainants, your orator, Barnhart, being in excess of two thousand dollars, and which is greatly in excess of any possible benefits which might accrue to said lots

8 chargeable therewith, all of which are vacant and unimproved, and in this and other instances the said assessment amounts to a practical confiscation of the property so made chargeable.

Your orators further state that, acting under said ordinance and contract, the defendant Gilsonite Roofing & Paving Co. undertook said work and has carried the same practically to completion as therein specified, and it has been or is about to be and will be accepted on behalf of said defendant city by its said street commissioner, who has or is about to and will certify the measurement thereof, as provided in said ordinance and contract, to the defendant McMath, the president of the board of public improvements of said city; and your orators show unto your honor that the said defendant, McMath, as such president of the board of public improvements, will and is about to levy and assess the costs of the said improvement in an amount largely in excess of ten thousand dollars as a special tax against the property of these complainants, and is about to and will, unless restrained by this honorable court, make out, certify, and deliver to the comptroller of said defendant city and through him to the defendant company, in payment for said work, special tax bills against the property of these complainants, which will constitute a first and prior lien on their said several lots respectively, subjecting them to the liability of being sold to satisfy the lien of said special assessment and tax bills.

Your orators further show to your honor that by the provisions of said charter, ordinance, and contract hereinbefore set out the costs and expenses of said public improvement *is* charged as a lien against their several lots, which are their private property, fronting or bordering on said improvement in the proportion that the linear feet of each lot fronting or bordering on said improvement bears to the total number of linear feet of all the property chargeable with the special tax aforesaid and in an arbitrary amount per each linear foot irrespective of the value of said property or whether the same is benefited by such alleged improvement or not and regardless of the amount of any such benefit and in spite of whether the said prop-
9 erty is actually damaged by the so-called improvement; and your orators show that under the provisions of the said charter and ordinance there is no provision made and no method prescribed or allowed for the ascertaining or assessing of the benefits and damages caused to the abutting property by said public work, nor is the same at all taken into account under said legal provisions, nor are your orators allowed under said provisions of law and the decisions of the law by the supreme court of Missouri to plead or raise the question of benefits and damages nor to make such a defense, and no legal proceedings are provided or allowed wherein such claim and defense may be heard and determined; but complainants aver that the said ordinance was passed and said contract let and said excessive cost incurred without opportunity or right to them to be heard in this behalf, and the said tax bills provided therein will be issued and a lien on your orators' property, and by express decision of the supreme court of said State the right is denied to your orators to defend suits against them to enforce said liens by reason of the inequality of said assessments and the failure of special benefit to their respective properties; and your orators aver that, although said legal provisions are in conformity with the law in the

State of Missouri and have been expressly upheld by the highest court of said State, nevertheless the same are repugnant to the constitution of the State of Missouri in its article II, sections 66 and 67 and 76, and to the Constitution of the United States in *the* articles V and XIV of the amendments thereto, in that they deny to your orators due process of law and subject their private property to being taken for public uses without compensation.

And your orators further show to your honor that, acting under the pretended sanction of said charter and ordinance provisions and the terms of payment of said contract, the said defendant, City of St. Louis, by and through the defendant president of the
10 board of public improvements, is about to levy and assess against the abutting property of these complainants the costs and expenses of said work and public improvement in an amount in excess of ten thousand dollars, and is about to issue to the defendant The Gilsonite Roofing & Paving Co. and the said company is about to demand and receive in payment thereof special tax bills in the names of and against the property of these complainants, which said levy and assessment when made and said tax bills when issued will be and are a lien on said property and a cloud on the title thereto; and your orators are denied the right by said charter and the law of Missouri to defend suits to satisty said tax bills by the sale of their said property; and complainants aver, by reason of the premises, that the said provisions of the charter of the defendant city and of the said ordinance 19681 and of the said contract with the defendant company are illegal, unconstitutional, and wholly void, and the levy and assessment of said costs and the issue of said special tax bills against complainants and their property are without just warrant of law and *is* usurpative, illegal, and void, but this the said defendants are threatening to do, and unless enjoined by order of this honorable court will straightway proceed to do, and your orators would thus suffer irreparable damage to their property and are wholly without adequate remedy at law to defend and protect their rights in this behalf.

Premises considered, your orators pray that the several parties herein named as defendants be made parties defendant hereto by the service of proper process, returnable to an early rule day, and that they be required to answer this bill, but not under oath, which is waived.

That a temporary writ of injunction or restraining order issue out of this honorable court, directed to the said several defendants, enjoining the city of St. Louis and president of the board of public improvements of said city from levying or assessing the costs and expenses of the said improvement of Whittier street against the property thereon abutting of these complainants and those for whose use this suit is brought, and from issuing or attempting to
11 issue special tax bills against these complainants or their property, or from otherwise creating liens or incumbrances against their said property or causing a cloud on the title thereto, and that the said defendant, The Gilsonite Roofing & Paving Company, their successors and assigns, be enjoined from demanding and

receiving any such special tax bills against the property of these complainants, and from proceeding or attempting in anywise to create or enforce a lien on complainants' property by reason of said work or payment therefore, or from in anywise attempting to subject complainants or their property to the payment of the costs and expenses of said work or any part thereof, and that on final hearing said injunction be made perpetual.

And that the court by its decree declare the provisions of the foregoing charter, ordinance, and contract, in so far as they pretend to impose the costs of said public improvement on these complainants or their property, to be illegal, unconstitutional, and void and without force or effect whatever to that end, and for such other and further and general relief as to your orators in equity and good conscience may belong.

JOSEPH WHELESS &
LEE W. GRANT,
Attorneys for Complainants.

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

Joseph Wheless, one of the parties complainant hereto, being duly sworn, on his oath says that the statements made in the foregoing bill are true in substance and in fact.

JOSEPH WHELESS.

Sworn to and subscribed before me this 3rd day of October, A. D. 1899.

[SEAL.] JAMES R. GRAY,
United States Commissioner at St. Louis, Missouri.

12 Upon the filing of said bill there was issued out of the clerk's office of said court a subpœna in chancery, which, with the marshal's return of service endorsed thereon, is in words and figures as follows, to wit:

(*Subpœna in Chancery.*)

UNITED STATES OF AMERICA, } sct:
Eastern Division of the Eastern Judicial District of Missouri, }

In the Circuit Court of the United States in and for the Eastern Division of said District.

The President of the United States of America to the City of St. Louis, Robert E. McMath, president of the board of public improvements of the city of St. Louis, and the Gilsonite Roofing & Paving Co., a corporation, Greeting:

You are hereby commanded to be and appear at rules to be held at the office of the clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, on the first Monday of November next, at the city of St. Louis,

then and there to answer the bill of complaint of Joseph Wheless, S. Malone Wheless, and Thomas M. Wheless, William R. Barnhart, Solomon L. Cohen, William L. Reed and Mary S. Reed, his wife; Halstead Burnet and Mary Burnet, his wife; Richard Shinnick and Isabelle Shinnick, his wife; Robert R. Grant, John Gaughan, Ewing Hill and Octavia Hill, his wife; Charles Herboth, Thomas B. Chambers, Joseph M. Crotty, Richard M. Crotty, Andrew Morello, William Morris and Margaret Morris, his wife, citizens of the State of Missouri, except Thomas B. Chambers, who is a citizen of the
13 State of Ohio, filed against you on the 3rd day of October, 1899. Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 3rd day of October, 1899.

Issued at office, in the city of St. Louis, under the seal of
[SEAL.] said circuit court, the day and year last aforesaid.

T. L. CRAWFORD, *Clerk.*

MEM.—The defendants to enter their appearance in this suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

T. L. CRAWFORD, *Clerk.*

(*Marshal's Return.*)

UNITED STATES OF AMERICA, }
Eastern Division of the Eastern Judicial District of Missouri, } *sct:*

I certify that I executed this writ at the city of St. Louis, in the eastern judicial district of Missouri, on the 3rd day of October, 1899, by delivering a certified copy thereof to Henry Ziegenhein, mayor of the within-named defendant corporation, The City of St. Louis, and by delivering a like copy to the within-named defendant, Robert E. McMath, president of the board of public improvements of the city of St. Louis, and by delivering a like copy to F. W. Nolker, president of the within-named defendant corporation, The Gilsonite Roofing and Paving Company.

LOUIS C. BOHLE,
U. S. Marshal, Eastern District of Missouri.

14 And at the September term, A. D. 1899, of said court, to wit, on said 3rd day of October, A. D. 1899, the following, among other, proceedings were had and appear of record in said cause, to wit:

(*Order to Show Cause.*)

JOSEPH WHELESS ET AL., Complainants,
vs.
THE CITY OF ST. LOUIS, ROBERT E. McMATH, President of the Board of Public Improvements of the City of St. Louis, and The Gilsonite Roofing & Paving Co., a Corporation, Defendants. } 4234.

Now come the complainants, by their solicitors, and file their bill of complaint herein, and on motion of said solicitors it is—

Ordered that the said defendants show cause before this court on Saturday, October 7th, 1899, at 10 o'clock a. m., why a temporary injunction and restraining order should not be issued against them as prayed in said bill of complaint.

It is further ordered that a copy of this order, together with a copy of the bill of complaint, be served upon the mayor of the city of St. Louis, and also upon the defendant The Gilsonite Roofing & Paving Co.

And it is further ordered that a copy of this order be served upon defendant Robert E. McMath, president of the board of public improvements of the city of St. Louis.

(Signed) ELMER B. ADAMS, *Judge.*

October 3, '99.

15 Upon a duly certified copy of above order appears the following return of the marshal, to wit:

(*Marshal's Return.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I certify that on the 3rd day of October, 1899, at the city of St. Louis, in the above-named district, I delivered a certified copy of the annexed order to show cause to Henry Ziegenhein, mayor of the within-named defendant corporation, The City of St. Louis, and by delivering a like copy to the within-named defendant, Robert E. McMath, president of the board of public improvements of the city of St. Louis, and F. W. Nolker, president of the within-named defendant corporation, The Gilsonite Roofing and Paving Company.

LOUIS C. BOHLE,
United States Marshal.

And afterwards, to wit, on the 7th day of October, A. D. 1899, there was filed in said cause a plea to jurisdiction in words and figures as follows, to wit:

(*Plea to Jurisdiction.*)

16 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States for said Eastern Division of the Eastern Judicial District of Missouri. In Equity.

JOSEPH WHELESS, S. MALONE WHELESS, and THOMAS M. Wheless, William R. Barnhart, Solomon L. Cohen, William M. Reed and Mary S. Reed, His Wife; Halstead Burnet and Mary Burnet, His Wife; Richard Shinnick and Isabelle Shinnick, His Wife; Robert R. Grant, John Caughan, Ewing Hill and Octavia Hill, His Wife; Charles Herboth, Thomas B. Chambers, Joseph K. Crotty, Richard H. Crotty, Andrew Morello, William Morris and Margaret Morris, His Wife, Complainants,

vs.

THE CITY OF ST. LOUIS, ROBERT E. MCMATH, President of the Board of Public Improvements of the City of St. Louis, and The Gilsonite Roofing and Paving Co., a Corporation, Defendants. } No. 4234.

Now come The City of St. Louis and Robert E. McMath, president of the board of public improvements, two of the defendants in the above-entitled cause, and now and at all times hereafter saving and reserving unto themselves and each of them all manner of benefit and advantage of exceptions which may be had or taken to the manifold errors and insufficiencies in said bill of complaint contained, and appearing only for the purposes set forth in this plea, and for their separate return to the order heretofore entered to show cause why a temporary injunction ought not to be granted upon said bill of complaint, file this their plea to the jurisdiction of the court, and for grounds of such plea aver:

First. That the court is without jurisdiction to hear and
17 determine the cause of action sought to be set forth in said bill of complaint.

Second. That there is not any matter in dispute between the defendants or any of them and any one of the complainants in said bill which *matter* exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

Third. These defendants are not informed, save by said bill of complaint, as to whether one of the complaintants, to wit, Thomas B. Chambers, is a non-resident of the State of Missouri and is a citizen of the State of Ohio, resident in the city of Cincinnati, and therefore deny such allegation; but these defendants specifically allege the fact to be that, whether or not said Thomas B. Chambers is a non-resident of the State of Missouri, the amount in dispute be-

tween said Thomas B. Chambers and the defendants does not exceed, exclusive of interest and costs, the sum or value of two thousand dollars, and these defendants show unto your honor that the said Thomas B. Chambers is the only complainant who is, by said bill of complaint, alleged to be a non-resident of the State of Missouri and a citizen of any other State.

Fourth. These defendants specifically deny that the proportion of special assessment which is threatened to be levied against the abutting lots of one of the complainants, to wit, William R. Barnhart, is in excess of two thousand dollars, as set forth in said bill of complaint; and these defendants respectfully show unto your honor that the allegation concerning the amount of the assessment against the lots of the said complainant, Barnhart, is the only allegation in said bill of complaint showing or tending to show that the amount in dispute between any one of the complainants and the defendants exceeds the sum of two thousand dollars; and these defendants allege the fact to be that the assessments which would be levied upon the lots belonging to the said complainant, Barnhart, by reason of the improvement of Whittier street, set forth in the bill of complaint, in the aggregate amount to far less than the sum of
18 two thousand dollars, and do not and will not exceed the sum of fourteen hundred dollars.

Fifth. It appears upon the face of the bill of complaint that the several complainants are and will be charged separately with the several amounts to be assessed against them for the improvement of Whittier street; therefore the amounts assessed against the several complainants separately cannot be added together in order to give the court jurisdiction. Since the matters in dispute are separate and distinct, and no one exceeds in value the sum of two thousand dollars, they cannot be joined in one suit, for convenience or economy or for any other reason, so as to give this court jurisdiction.

All which matters and things these defendants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

And, to the end that the question of the jurisdiction of this court may be determined at the threshold of the case, these defendants pray the court that the issues of fact herein set forth may be determined separately and before any other or further action shall be required of these defendants to show cause why the temporary injunction prayed for in the bill of complaint herein should not be granted.

B. SCHNURMACHER,
CHAS. CLAFLIN ALLEN,
Attorneys for Defendants The City of St. Louis and Robert E. McMath, President of the Board of Public Improvements of said City.

19 And at said September term, A. D. 1899, of said court, to wit, on said 7th day of October, A. D. 1899, the following

further proceedings were had and appear of record in said cause, to wit:

(*Plea to Jurisdiction Submitted.*)

JOSEPH WHELESS ET AL., Complainants,
vs.
THE CITY OF ST. LOUIS ET AL., Defendants. } 4234.

Now comes said parties, by their respective solicitors—the complainants by Joseph Wheless, the defendants City of St. Louis and R. E. McMath by B. Schnurmacher and Charles Claflin Allen, and the defendant Gilsonite Roofing & Paving Co. by Kehr & Tittman—and thereupon the plea to the jurisdiction of the court, this day filed, is argued by counsel and submitted to the court.

Affidavit of Varrelmann filed.

Said affidavit is in words and figures as follows, to wit:

(*Affidavit of Chas. Varrelmann.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States for said Eastern Division of the Eastern Judicial District of Missouri.

JOSEPH WHELESS ET AL., Complainants,
vs.
THE CITY OF ST. LOUIS ET AL., Defendants. } In Equity. No. 4234.

20 Charles Varrelmann, being duly sworn, on his oath says that he is the street commissioner of the city of St. Louis, duly qualified and acting as such street commissioner, and has been such commissioner since about June first, eighteen hundred and ninety-nine, and theretofore for many years affiant was in charge of the construction of streets in the street department of the city of St. Louis. Affiant has personal knowledge of the improvement of Whittier street between Washington boulevard and Finney avenue, and has been familiar with the special projected improvement since it was first proposed by the street commissioner in 1897. Affiant further says that from actual measurements upon a plat of said street for said improvement and a calculation of the cost which will be assessed against the abutting property on said Whittier street under ordinance No. 19681, affiant has knowledge of the approximate amount which will be assessed against each and every lot on said street. Affiant says that no lot of land on said street which is or will be subject to assessment for said tax for the improvement of said street under said ordinance will be assessed to an amount equal to two thousand dollars. Affiant further says that no person owning lots on said street will have an assessment against all of the lots owned by such person which in the aggregate will amount to two thousand dollars. Affiant more specifically says that the lots belonging to the complainant Thomas B. Chambers will not have as-

sessed against them for said special tax to exceed the sum of one hundred and seventy-five dollars. This affiant further says specifically that the lots belonging to William R. Barnhart are two in number in separate portions of said street; that one of said lots will be assessed approximately six hundred dollars and the
21 other will be assessed approximately seven hundred and eighty dollars, making a total of thirteen hundred and eighty dollars to be assessed against all of the lots owned by complainant William R. Barnhart. This affiant further says that until the actual measurements of the improvement have been made after the completion of the work it is impossible to make a calculation absolutely exact because of very slight variations in measurements; but this affiant says that under no circumstances, nor by any calculation which can be made under said ordinance No. 19681 and the contract for the improvement of said street under which said work is done, can the assessment against the property of said William R. Barnhart exceed the sum of fourteen hundred dollars.

And this affiant further says that no property belonging to any one complainant in this cause of action which is to be assessed on said lot will be assessed in an amount exceeding or equal to said sum of fourteen hundred dollars. Further affiant says not.

CHAS. VARRELMANN.

Subscribed and sworn to before me this seventh day of October, 1899.

[SEAL.] JAMES R. GRAY,
U. S. Commissioner.

Endorsed: "Affidavit of Chas. Varrelmann. Filed Oct. 7, 1899. T. L. Crawford, clerk."

22 And afterwards, at the said September term, A. D. 1899, of said court, to wit, on the 11th day of October, A. D. 1899, the following further proceedings were had and appear of record in said cause, to wit:

(*Entry of October 7, 1899, Vacated, &c.*)

JOSEPH WHELESS ET AL., Complainants,
vs.
THE CITY OF ST. LOUIS ET AL., Defendants. } 4234.

Ordered that the entry made in this cause on October 7, 1899, be vacated, and that the following be entered in lieu thereof, *nunc pro tunc:*

Now come said parties, by their respective solicitors, and the defendants file their plea to the jurisdiction of the court, and complainants file their demurrer to said plea. Thereupon said demurrer is argued by counsel and submitted to the court.

(Signed) ELMER B. ADAMS, *Judge.*

October 11, '99.

Said demurrer to plea to jurisdiction is in words and figures as follows, to wit:

(*Demurrer to Plea to Jurisdiction.*)

In the Circuit Court of the United States.

JOSEPH WHELESS ET AL. }
vs. } # 4234.
CITY OF ST. LOUIS ET AL. }

Come now the complainants jointly, on this 7th day of October, 1899, and demur to the plea this day filed by defendants to the jurisdiction of this court in the premises, and for ground of de-
23 murrer say that the matters alleged in said plea, if true, do not show facts inconsistent with the jurisdiction of this court and do not constitute a valid and sufficient plea to the jurisdiction of the court.

Wherefore complainants pray the judgment of the court in the premises.

JOSEPH WHELESS &
LEE W. GRANT,
Att'ys for Complainants.

Endorsed: "Demurrer to plea to jurisdiction. Filed Oct. 11, 1899, *nunc pro tunc* as of Oct. 7, '99. T. L. Crawford, clerk."

And at said September term, A. D. 1899, of said court, to wit, on said 11th day of October, A. D. 1899, the following further proceedings were had and appear of record in said cause, to wit:

(*Order Overruling Demurrer to Plea to Jurisdiction.*)

JOSEPH WHELESS ET AL., Complainants, }
vs. } 4234.
THE CITY OF ST. LOUIS ET AT., Defendants. }

The court having fully considered the demurrer to the plea to jurisdiction, heretofore submitted herein, doth order that said demurrer be overruled.

(Signed) ELMER B. ADAMS, *Judge.*

October 11, '99.

And afterwards, at the said September term, A. D. 1899, of said court, to wit, on the 26th day of October, A. D. 1899, the following further proceedings were had and appear of record in said cause, to wit:

24 (*Order Sustaining Plea to Jurisdiction and Dismissing Bill.*)

JOSEPH WHELESS, S. MALONE WHELESS, and THOMAS M. Wheless, William R. Barnhart, Solomon L. Cohen, William L. Reed and Mary S. Reed, His Wife; Halstead Burnet and Mary Burnet, His Wife; Richard Shinnick and Isabelle Shinnick, His Wife; Robert R. Grant, John Gaughan, Ewing Hill and Octavia Hill, His Wife; Charles Herboth, Thomas B. Chambers, Joseph M. Crotty, Richard M. Crotty, Andrew Morello, William Morris and Margaret Morris, His Wife, Complainants,

vs.

THE CITY OF ST. LOUIS, ROBERT E. MCMATH, President of the Board of Public Improvements of the City of St. Louis, and The Gilsonite Roofing & Paving Co., a Corporation, Defendants.

4234.

Now come the parties, by their respective solicitors, and the complainants admitting the truth of the averments contained in the defendants plea to jurisdiction heretofore filed and declining to plead further thereto, it is now, on motion of defendants' solicitors, by the court—

Ordered, adjudged, and decreed that the said plea to jurisdiction be sustained, and that the bill of complaint herein be, and the same is hereby, dismissed at complainants' costs, and that a fee bill or execution issue therefor.

(Signed) ELMER B. ADAMS, *Judge.*

October 26, '99.

25 And afterwards, at the said September term, A. D. 1899, of said court, to wit, on the 27th day of October, A. D. 1899, the following further proceedings were had and appear of record in said cause, to wit:

(*Order Allowing Appeal, &c.*)

JOSEPH WHELESS ET AL., Complainants,
vs.
CITY OF ST. LOUIS ET AL., Defendants.
4234.

Now come complainants, by solicitor, and file assignment of errors and motion for appeal from the decree heretofore rendered herein to the Supreme Court of the United States; on consideration whereof, it is ordered that said appeal be allowed; and it is further ordered that upon complainants giving an appeal bond in the penal sum of five hundred dollars, the clerk of this court make out and certify to said Supreme Court of the United States a full, true, and complete transcript of the record and proceedings in this cause.

Said assignment of errors and motion for appeal is in words and figures as follows, to wit:

26 (*Assignment of Errors & Motion for Appeal.*)

In the Circuit Court of the United States, October Term, 1899.

JOSEPH WHELESS ET AL.
vs.
CITY OF ST. LOUIS ET AL. } No. 4234.

Come now the complainants, by their counsel, and except to the rulings and order of the court heretofore rendered at this term of court in overruling their demurrer to the plea of the defendants and in dismissing their bill for want of jurisdiction and assign the same for error, and for matter of their assignment of errors say:

1st. The court erred in overruling the demurrer to the plea to the jurisdiction of the court.

2nd. The court erred in dismissing the bill for want of jurisdiction.

3rd. The court erred in holding that it had no jurisdiction of the bill, because the amount of special tax which might be assessed against any one of the complainants severally would not exceed the sum or value of $2,000.

4th. The court erred in holding that the entire amount of the special tax to be assessed and levied under the ordinance and contract as the cost of the improvement of Whittier street, viz., over $10,000.00, was not the matter in dispute and within the jurisdiction of the court.

Wherefore complainants file this their assignment of errors to the said orders and rulings of the court, and in open court pray that the question of the jurisdiction of this honorable court in the premises be duly certified and an appeal allowed to the next term of the Supreme Court of the United States.

JOSEPH WHELESS &
LEE W. GRANT,
Solicitors for Complainants.

Endorsed: "Assignment of errors and motion for appeal. Filed Oct. 27, 1899. T. L. Crawford, clerk."

27 And afterwards, at the said September term, A. D. 1899, of said court, to wit, on the 7th day of November, A. D. 1899, the following further proceedings were had and appear of record in said cause, to wit:

(*Appeal Bond Approved and Filed.*)

JOSEPH WHELESS ET AL., Complainants,
vs.
CITY OF ST. LOUIS ET AL., Defendants. } 4234.

Now come complainants, by their solicitor, and present an appeal bond, which is approved by the court and filed.

Said appeal bond is in words and figures as follows, to wit:

(Appeal bond.)

Know all men by these presents that we, Joseph Wheless, Wm. M. Reed, Halstead Burnet, Richard Shinnick, John F. Gaughan, Chas. A. Herboth, Michael M. Crotty, and The American Bonding and Trust Company of Baltimore City, as surety, are held and firmly bound unto the City of St. Louis, Robert E. McMath, president of the board of public improvements of the city of St. Louis, & the Gilsonite Roofing & Paving Co., a corp., in the full and just sum of five hundred dollars, to be paid to the said city of St. Louis, Robert E. McMath, & Gilsonite Roofing & Paving Co., their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

28 Whereas lately, at the September term, A. D. 1899, of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, in a suit depending in said court between Joseph Wheless *et al.*, plaintiffs, and The City of St. Louis *et al.*, defendants, a decree was rendered against the said Joseph Wheless *et al.* dismissing their bill for the alleged want of jurisdiction in said court to entertain it, and the said Joseph Wheless *et al.* have obtained an appeal *of* the said court to reverse the said decree of dismissal in the aforesaid suit, said appeal being taken & allowed in open court during the said September term, 1899, returnable to the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the date of said appeal:

Now, the condition of the above obligation is such that if the said Joseph Wheless *et al.*, complainants & appellants, shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their said appeal, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JOSEPH WHELESS, [SEAL.]
WM. M. REED,
HALSTEAD BURNET,
RICHARD SHINNICK,
JOHN F. GAUGHAN,
CHAS. A. HERBOTH,
MICHAEL M. CROTTY,
By JOSEPH WHELESS, *Their Att'y.* [SEAL.]
LEE W. GRANT. [SEAL.]
AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,
By THOS. C. HENNINGS, *Its Att'y-in-fact.* [SEAL.

Approved by—
JNO. F. PHILIPS,
U. S. Dist. Judge.

Endorsed: "Bond, $500.00. Filed Nov. 7, 1899. T. L. Crawford, clerk."

29 And afterwards, at the said September term, A. D. 1899, of said court, to wit, on the 23rd day of November, A. D. 1899, and within thirty days after the granting of said appeal, there was filed in said cause a certificate as to the jurisdictional question, duly signed on said day by the judge; which said certificate of jurisdictional question is hereto attached and transmitted as a part of the record in this case:

30 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, September Term, 1899.

JOSEPH WHELESS ET AL.
vs.
CITY OF ST. LOUIS ET AL. } No. 4234. In Equity.

Certificate of Jurisdictional Question.

I, Elmer B. Adams, United States district judge within and for the aforesaid district, do hereby certify that the above-entitled cause came on to be heard by the court at, to wit, the September, 1899, term of the court, upon the application for a temporary injunction, as prayed in the bill, it being alleged in said bill that complainants are severally the owners of certain and nearly all the lots of land abutting on Whittier street between Washington boulevard and Finney avenue, in the city of St. Louis; that the defendant city, acting under the provisions of its charter and ordinances, had entered into a contract with the defendant paving company to improve said street in front of complainants' property, and said company was engaged in doing the work, which was a public improvement; that the cost of making said improvement is, according to the terms of said charter, ordinance, and contract, a charge upon complainants' abutting property, and is about to be levied and assessed against it as a special tax, according to the frontage of said lots on said street, and special tax bills are about to be issued separately against each lot of complainants, which would be liens upon their said property and subject the same to being sold to satisfy said special assessment; which assessment and levy, it is averred, are in violation of com-
31 plainants' rights under the Federal Constitution. Wherefore an injunction was prayed to restrain said city from levying and assessing the cost of said public improvement against complainants' property and from issuing special tax bills against them for the same, and for a decree declaring said charter, ordinance, and contract provisions void; that the cost of said improvement, which was about to be assessed and levied against all the abutting property, is largely in excess of the sum of $10,000.

Defendants filed a plea to the jurisdiction of the court, supported by an affidavit showing that the amount of special tax which would be assessed and levied against the property of any one of the complainants severally would not exceed $1,400 and would not be an amount equal to $2,000, and that hence the matter in dispute between the

parties was not of the sum or value necessary to give jurisdiction to the circuit court of the United States, and that the bill should be dismissed for want of jurisdiction.

Complainants demurred to the said plea and submitted the question of jurisdiction thus raised to the determination of the court, and thereupon the court, after due hearing and consideration, did overrule said demurrer, the court being of the opinion, as set out in the written opinion filed in said cause and accompanying this appeal, that the court was without jurisdiction of said cause in respect of the sum or value in dispute, and upon complainants confessing the matter of the plea in point of fact and refusing to plead further, their said bill was by the court dismissed for want of jurisdiction.

Now, therefore, it is certified that the question of the jurisdiction of the circuit court arising on the pleadings in this case is, 1st, Is the sum or value in dispute, and hence the amount necessary to confer jurisdiction on this court, the total cost of the public improvement which it is sought to levy and assess against the abutting property of all the complainants as a whole and which exceeds $2,000,
32 or is such jurisdictional amount determined by the amount which any of the complainants severally would be required to pay and which is less than $2,000, it appearing also in this case that no such assessment or levy has yet been made by the city? and 2nd, Can complainants join their several assessments so as to make up an amount in excess of $2,000, and thus be within the jurisdiction of the court?

And it is further certified that the foregoing question of jurisdiction was the sole question involved at the hearing of said cause and upon which said cause was dismissed and the final decree entered and is the question upon which alone the appeal herein is, in open court at the September term, 1899, prayed and allowed and hereby certified to the Supreme Court of the United States.

ELMER B. ADAMS, *Judge.*

November 23, 1899.

32½ [Endorsed:] No. 4234. United States circuit court, eastern division of the eastern judicial district of Missouri. Joseph Wheless *et al.* against City of St. Louis *et al.* Certificate of jurisdictional question. Filed Nov. 23, 1899. T. L. Crawford, clerk.

33 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

JOSEPH WHELESS ET AL., Complainants,
vs.
THE CITY OF ST. LOUIS ET AL., Defendants. } No. 4234.

Joseph Wheless and Lee W. Grant, solicitors for complainants; B. Schnurmacher, C. Claflin Allen, and Kehr & Tittman, solicitors for defendants.

Opinion of the Court.

October 11, 1899.

ADAMS, *District Judge:*

This is a bill to restrain the city of St. Louis and the president of the board of public improvements of said city from making an assessment and levying the same against the property abutting on Whittier street between Washington avenue and Finney avenue to pay the cost and expense of paving that part of Whittier street.

It is alleged that the defendants are proceeding to improve that part of the street under and pursuant to the provisions of the charter of the city, an ordinance passed by the municipal assembly of the city, and a contract made between the city and the defendant The Gilsonite Roofing and Paving Company, whereby assessments are contemplated and intended to be made against abutting
34 property, not according to the benefits which the property receives as a result of the improvements, but in the arbitrary proportion which the linear feet of each lot fronting or bordering on the improvement bears to the total number of linear feet so bordering thereon; that under the provisions of said charter, ordinance, and contract the complainants' property bordering on the street is made subject to a tax or charge without due process of law and in violation of the 14th amendment of the Constitution of the United States. There are several complainants in this case, each owning separate lots abutting said street, but none of them liable to be assessed for an amount equal to $2,000, the minimum jurisdictional amount of this court in such cases.

The amounts which the property of all the complainants are liable to be assessed, according to the averments of the bill, aggregated together, largely exceed $2,000.

There is no showing by the bill that any of the complainants own or are interested in any of the other lots, except that which it is averred he himself owns. In other words, the bill shows that the complainants have several interests, each according to his ownership of the property abutting the improvements, and in no sense a joint interest in all the lots.

The question is whether this court has jurisdiction to hear and determine this controversy.

This question has received the consideration of the Supreme Court of the United States in many cases, and as a result of them all the following proposition may be considered as settled: "If several persons be joined in a suit in equity * * * and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of
35 jurisdiction; but where their interests are distinct and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arise out of the same transaction, * * * such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdic-

tion." * * * Clay *vs.* Field, 138 U. S., 464, and cases there cited.

Cases in which parties may aggregate their demands for jurisdictional purposes are illustrated by Shields *vs.* Thomas, 17 How., 3, and other cases referred to in the leading case of Gibson *vs.* Shufeldt, 122 U. S., 27. The other class of cases in which complainants are not allowed to aggregate their demands for jurisdictional purposes are illustrated by *Ex parte* Baltimore and Ohio Railroad, 106 U. S., 5, and a large number of cases therein referred to, and also by cases cited and commented upon in Gibson *vs.* Shufeldt, *supra.* It does not seem necessary to discuss or distinguish between these many cases. It will be found that they enforce the distinction already pointed out. The question, therefore, now before the court for determination is to which class does the case now under consideration belong.

In my opinion, it clearly belongs to the class last mentioned. It is a case in which many parties may be proper, but not necessary. The whole relief, to which all claim to be entitled, could as well be secured at the suit of any one of them. In other words, the controversy is several in its nature, in its object, and in its result. The right to be protected is several and individual. The wrong to be redressed is personal and not collective in any sense. The matter in controversy between complainant Wheless and the city of
36 St. Louis is one which concerns Wheless alone, and the right of the city of St. Louis to take his property and the right to the tax which it might impose is in no manner dependent upon whether the city proceeds against any one or more of the complainants in this case. It may be and undoubtedly is true that some of the facts available to Wheless may also be available to complainant Barnhart. In other words, that their rights or liabilities arise out of the same transaction or the same alleged unlawful action threatened to be taken by the defendants, and that their rights may be affected by the same facts, but these circumstances do not entitle them to aggregate their demands for jurisdictional purposes. Clay *vs.* Field, *supra.*

In reaching a conclusion with regard to the correct principles to be applied in this case, I have been very materially aided by the fact that the Supreme Court of the United States has in the case of *Ex parte* Baltimore and Ohio Railroad Company, *supra*, and in the case of Gibson *vs.* Shufeldt, *supra*, critically considered all of the many cases before that time passed upon by them relating to this subject, and in recurring to the opinions in these two cases it is found that the cases of Shields *vs.* Thomas, 17 Howard, 3; Market Company *vs.* Hoffman, 101 U. S., 112; The Connemara, 103 U. S., 754; The Mamie, 105 U. S., 573, upon which complainants' counsel rely, have been judicially determined to have no application to cases like the present. They are all classified by the Supreme Court as belonging to the cases where the controversies are about matters in which the several complainants were interested collectively under a common title, and for that reason proper cases for the aggregation of claims on the part of numerous complainants in order to make up the juris-

dictional amount. It is also found that the cases last referred
37 to as relied upon by complainants' counsel are distinguished from the other class of cases in which the cause of action grows out of the same transaction merely, involving no common title or undivided interest, such as Seaver *vs.* Bigelow, 5 Wall, 208; Paving Company *vs.* Mulford, 100 U. S., 147, and Russell *vs.* Stansell, 105 U. S., 303, so that if any particular expressions are found in any of the first-mentioned series of cases, which might be seized upon as seeming authority for the contention of the complainants, it must be borne in mind that all those cases have been classified by the Supreme Court as belonging to a class not like that before the court. In this connection, and for the same purpose, see also Henderson *vs.* Wadsworth, 115 U. S., 264.

Although I do not think it necessary, as already stated, to separately consider the great array of cases bearing on this subject, there are two or three of them which seem to me to be so entirely opposite to the facts in the case under consideration that I deem it best to refer to them somewhat more particularly.

In the case of Hawley *vs.* Fairbank, 108 U. S., 543, several persons who were owners of bonds of the town of Amboy, Illinois, united as relators in an application to the circuit court of the United States for a mandamus requiring the county clerk to compute and assess upon all the taxable property in said town a sufficient sum to pay the judgments obtained by the relators. One of the relators had a demand in excess of the jurisdictional amount; none of the others had a demand equal to the required jurisdictional amount. The trial court awarded a writ of mandamus directed to the county
38 clerk, commanding him to extend upon the tax collector's book of the town a sufficient sum to pay each of the several judgments held by the relators. To reverse that judgment a writ of error was taken to the Supreme Court of the United States.

The court say: "We are met at the outset with a motion of the defendants in error to dismiss the writ in this case on the ground that the several judgments proceeded upon below cannot be united to give jurisdiction." The court sustained the motion as to all except one, who had an amount which was sufficient, and remarked as follows: "In the present case distinct causes of action in favor of distinct parties were united for convenience and to save expense in one suit, and distinct orders were made in favor of each one of the several judgment creditors."

It seems to me that the same argument which is made by counsel for the complainants in this case, if sound, would have applied to that case. In that case, it is true, there was not an attempt to enjoin the collection of taxes, but there was an attempt to enforce the collection of a tax. So far as the town of Amboy was concerned, it was one tax which was sought to be enforced. Just as in the case now before the court, so far as the city of St. Louis is concerned, it is one tax that is sought to be enjoined, and if the total of the tax sought to be collected in the Hawley case was not considered in determining the jurisdiction of the court, it is not apparent how the whole

amount of the tax sought to be enjoined in the case at bar can be considered in determining the jurisdiction.

In the case of Russell *vs.* Stansell, 105 U. S., 303, the controversy arose over the action of Stansell in securing from the levee board of Mississippi, district No. 1, an assessment of taxes for the collection of a judgment before that time obtained by Stansell
39 against the levee board. It was claimed that the proceedings resulting in the assessment were illegal and unjust, and certain individuals who were assessed in small amounts underneath the jurisdiction of the court brought a bill to enjoin the further proceedings on the part of the board for the collection of the tax. It appeared in that case, as in this, that no single individual among all the parties complainant could in any event be made liable for an amount equal to the jurisdictional amount required for an appeal. On the presentation of the petition the court granted a preliminary injunction, but on final hearing the injunction was dissolved and the petition dismissed. From the last order an appeal was taken to the Supreme Court of the United States. The appellee Stansell moved to dismiss because the amount in dispute between him and any one of the several persons charged with the payment of the assessment is less than $5,000, the jurisdictional amount of the Supreme Court of the United States. The court in its opinion in that case say: "While the appellants, and those whom they have chosen to represent, are all interested in the question on which their liability to the appellee depends, they are separately charged with the several amounts assessed against them; there is no joint responsibility resting upon them as a body. The proceeding on his (Stansell's) part was to require each of the several land-owners of the levee district to pay his separate share of the debt that had been established against the district. The recovery was against each owner separately. While the appellants were permitted, for convenience and to save expense, to unite in a position setting forth the grievances of which complaint was made, their object was to relieve each separate owner from the amount which he personally or his property was found to be accountable. An injunction, if granted, would
40 necessarily prevent the appellee from collecting from each owner the amount for which he was separately liable. It is clear that under the rulings in Paving Company *vs.* Mulford, 100 U. S., 147; Seavers *vs.* Bigelows, 5 Wall., 208; Rich *vs.* Lambert, 12 Howard, 347; Stratton *vs.* Jarvis, 8 Pet., 4, and Oliver *vs.* Alexander, 6 Pet., 143, such distinct and separate interests cannot be united for the purpose of making up the amount necessary to give us jurisdiction on appeal."

It is clear, and seems to have been so conceded by counsel on the argument of this case, that the principles governing the right of an appeal to the Supreme Court of the United States, in so far as the amount is concerned requisite to confer jurisdiction upon the Supreme Court of the United States in such appeal, are the same as those involved in considering the amount requisite to give jurisdiction to this court in an original proceeding. Such being the case the authority of Russell *vs.* Stansell, *supra*, seems to be entirely ap-

plicable and controlling here. In the case now under consideration several persons unite in a petition just as they did in the Russell case, setting forth the grievances of which they complain. The object in this case, as it was in that, is to relieve each separate owner from the amount — which he personally or his property may be found accountable, and inasmuch as it appears that no one of the complainants is liable, or can be made liable, by the proceeding against which they complain, in an amount equal to $2,000, this court, following the doctrine of the Supreme Court, has no jurisdiction and can afford no relief.

It was suggested in argument that a different rule is applicable to a case where no assessment has been in fact made from that which is applicable to a case where an assessment has already been made like the Russell case. I am not able to appreciate the force of this distinction.

41 In either of such cases the purpose sought to be accomplished is to declare the proceedings about to be taken or which have been taken to enforce a payment of certain taxes illegal and unwarranted in the law, and in my opinion it makes no difference in the applicatory principles whether the defendants have taken one of the initial steps towards consummating the alleged illegal act of subjecting complainants' property to an unlawful charge, or whether they have taken none of them, but are threatening and intending so to do.

Counsel for complainants rely specially upon the cases of Davies *vs.* Corbin, 112 U. S., 36, and Brown *vs.* Trousdale, 138 U. S., 389.

Concerning the first of these cases it appears that the chief justice, who wrote the opinion, in reaching a conclusion found and held that all the relators claim under one and the same title, namely, the levy of taxes already made expressly for their benefit, and therefore that they, and each and all of the relators, have a common interest in the tax, and inasmuch as it was immaterial to the collector whether he paid it to one or another of the complainants, the chief justice properly classifies this case with those of Shields *vs.* Thomas, *supra*, and other cases in which aggregation of claims may be made for jurisdictional purposes. In the other of the cases so relied upon, the chief justice in delivering the opinion of the court, properly states that the main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay the interest thereon, and finally the principal thereof, and not the mere restraining of a tax for a single year, and for this reason holds that the rule applicable to complainants each claiming under a separate and distinct right in respect to a

42 separate and distinct liability, contested by the adverse party, is not applicable to that case.

As a result of all the cases, and especially by the authority of the cases of Hawley *vs.* Fairbanks, *supra*, and Russell *vs.* Stansell, *supra*, I am of the opinion that the court has no jurisdiction in the present case.

It results from this holding that the demurrer to the plea to the jurisdiction of the respondents must be overruled.

43 UNITED STATES OF AMERICA, *Eastern Division of the Eastern Judicial District of Missouri,* } *ss:*

I, T. L. Crawford, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the pleadings and proceedings in case No. 4234 of Joseph Wheless *et al.*, complainants, against The City of St. Louis *et al.*, defendants, as fully as the same remain on file and of record in said case in my office, and that the certificate hereto attached is the original certificate of jurisdictional question, signed by the judge.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District, Missouri.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this 23rd day of November, in the year of our Lord eighteen hundred and ninety-nine.

T. L. CRAWFORD,
Clerk of said Court,
By JOHN J. CONWAY, *Deputy.*

[Ten-cent U. S. internal-revenue stamp, canceled 11, 23, '99. T. L. C.]

[Endorsed:] No. 4234. United States circuit court, eastern division of the eastern judicial district of Missouri. Joseph Wheless *et al.* against The City of St. Louis *et al.* Duly certified transcript of the pleadings and proceedings in the above-entitled cause.

Endorsed on cover: File No., 17,576. E. Missouri C. C. U. S. Term No., 161. Joseph Wheless, William M. Reed, Halstead Burnet *et al.*, appellants, *vs.* The City of St. Louis *et al.* Filed November 28th, 1899.